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In The

Supreme Court of the United States

No. 71-

71-1086

JOHN A. MASIELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

No. 71-

JOHN A. MASIELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Petitioner, JOHN A. MASIELLO, respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the order of that Court which affirmed a judgment of the United States District Court for the Southern District of New York, convicting petitioner of bribery of a Revenue

Officer in connection with an audit which was being conducted of the petitioner's tax returns.

The Court of Appeals affirmed the judgment of conviction without opinion and, on the 26th of January, 1972, denied a petition for a rehearing, also without an opinion.

Petitioner was sentenced to two years imprisonment consecutive to five years imprisonment which he had received on a related earlier conviction in the case of United States v. John A. Masiello and John A. Masiello, Jr. This Court denied Certiorari in connection with that first case, in the last few weeks (434 F.2d 33, 445 F.2d 1324).

Opinion Below

The Second Circuit rendered no opinion in its affirmance of the judgment of conviction or in its denial of a rehearing.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals, Second Circuit, denied a motion for rehearing on the 26th of January, 1972 (see Appendix).

Questions Presented

1. Whether the conviction herein was a "poisoned fruit" of an unlawful search and seizure conducted in connection with a prior case in which certain records used directly and indirectly in the case at bar had been seized without a warrant?

2. Whether petitioner was entrapped by an IRS agent whose idea it originally was to attempt to bribe another agent?

3. Whether "regulations" of the Internal Revenue Service which were never published in the Federal Register should have been used in order to prove petitioner's intent to violate the law?

Constitutional and Statutory Provisions Involved

The Fourth, Fifth, and Sixth Amendments of the United States Constitution are involved herein.

Statement of the Case

It is petitioner's contention that the instant case is a "poisoned fruit" of the unlawful search and seizure perpetrated by the Government when it ransacked the business premises of Masiello which also housed the records of A.N.R. Leasing Co., Setmar Holding Corp. and so forth in connection with another case also involving bribery, United States of America v. Masiello et al., 434 F.2d 33, remanding the case, and 445 F.2d 1324, affirming. The Court below had originally granted

a stay of mandate in the previous case which petitioner maintains was predicated upon an unlawful search and seizure, although just recently, this Court denied certiorari therein. The previous case was reported sub nom., United States v. Masiello, 434 F.2d 33 (remanded); 445 F.2d 1324 (affirming).

The case at bar is intertwined with the aforesaid prior case which also alleged a bribery of a public official.

The facts of the first case, we submit, clearly lead to the inference that the audit in the case at bar was a direct outgrowth of the search and seizure, sans warrant, in the first case, wherein the Circuit Court declared originally on the remand:

> "If these characterizations of the facts are accurate, the activities of the federal officers could hardly be considered consistent with the requirements of the Fourth Amendment. ... ."

The case at bar had clear reference to Setmar Holding Corp., A.N.R. Leasing Co. (40a), etc. There were records of these, and other corporations operated by appellant whose records were seized in connection with the warrantless search in the first case, supra.

The first case herein, having been remanded for a hearing which produced substantial amounts of new testimony, was then affirmed without opportunity for oral hearing or to submit a brief.

This Court never passed upon the issue of the unlawful search and seizure in the first case since it denied certiorari. It is well known that the "denial of a Writ of Certiorari imports no expression of opinion upon the merits of the case as the bar has been told many times." (United States v. Carver, 260 U.S. 482, 490; Brown v. Allen, 344 U.S. 443, 451-2, 491-2; House v. Mayo, 324 U.S. 42, 48, and Sunal v. Large, 332 U.S. 174, 181.)

Since there was a significant amount of evidence referred to in the case at bar which we maintain could only have come from documents and records which were seized without a warrant in the first case, that there can be no doubt but that the case at bar is a "poisoned fruit" of the initial illegality (Nardone v. United States, 308 U.S. 388; Silverthorne Lubr. Co. v. United States, 251 U.S. 385).

A review of the record in the case at bar will disclose that the special IRS agent would not have entered the case but for the seizures of records of corporations in which petitioner had interests during the prior case.

Argument

I.

FOR THE REASONS SET FORTH IN THE STATEMENT OF THE CASE, THAT IS, THAT THE CASE AT BAR WAS A "POISONED FRUIT" OF AN UNLAWFUL SEARCH AND SEIZURE CONDUCTED IN A PRIOR CASE INVOLVING PETITIONER, THE JUDGMENT OF CONVICTION SHOULD BE VACATED AND THE INDICTMENT DISMISSED.

We do not believe that it is necessary to repeat the statement of the case since the interrelation of the seizure of evidence therein with the prosecution in the instant case is amply revealed. Records of corporations in which petitioner had an interest, such as A.N.R. Leasing Co., Setmar Holding Corp., were seized without a warrant.

The special agent clearly would not have had any basis for his investigation except for that seizure. This Court, by denying certiorari in the first case rendered no opinion as to the propriety of the search and seizure. The Court below, however, had previously indicated that the search and seizure was unlawful and it then denied oral argument to petitioner from the appeal of a suppression hearing (Nardone, supra) in that case. [See full discussion in "Statement of the case," supra.]

II.

THERE IS A STRONG INDICATION THAT PETITIONER WAS "ENTRAPPED" AND FOR THAT REASON CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER HIS RIGHTS WERE THEREBY VIOLATED.

While not specifically raised in the Court below, it is submitted that this Court, under Rule 52(b), F.R. Crim. P. should review the case as to the entrapment issue. In the recent case of Mascia v. United States, ___ U.S. ___, the Supreme Court denied certiorari with three justices dissenting and voting in favor of granting it. There are now two additional justices sitting (10 CrL 4114).

Justices Douglas, Marshall and Blackmum believed that certiorari should have been granted (10 CrL 4114, 4111).

In the case at bar, it is apparent that Agent Ruggiero offered Williams the opportunity of paying him a bribe and gratuity to get information about a tax fraud audit and investigation. There is no indication that the appellant had ordered Williams to initially approach Ruggiero or that he had a predisposition to pay a bribe. Thus the factual situation comes within the purview of entrapment. (Sherman v. United States, 356 U.S. 369; Serrells v. United States, 287 U.S. 435; United States v. Comi, 336 F.2d 856 (4 Cir. 1964), cert. denied 379 U.S. 992; Butts v. United States, 273 Fed. 35 [CCA 8, 1921]; 73 Harv. L. Rev. 1333 [Entrapment] at 1340, 1341 1960].)

Ruggiero was an "agent provocateur" as described in "Uncommon Law," Sir A.P. Herbert (1952, pp. 77-81) referring to Rex v. Commissioner of Metropolitan Police etc.

III.

THE CONVICTION IN THE TRIAL COURT HEREIN WAS IN LARGE MEASURE BASED UPON IRS "REGULATIONS" WHICH WERE NEVER PUBLISHED IN THE FEDERAL REGISTER. THE PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE THE TRIAL COURT REFUSED A CHARGE THAT THESE UNPUBLISHED REGULATIONS COULD NOT BE THE PREDICATE FOR FINDING "INTENT" BY PETITIONER TO SOLICIT AGENT RUGGIERO TO VIOLATE HIS DUTY.

The "regulations" of the IRS were apparently for internal use only, although the Court maintained that they had the force of "law." This holding undoubtedly violated petitioner's right to a fair trial.

Since the "regulations" were employed to galvanize the bribery and conspiracy statutes into effect, the statutes were applied in an unconstitutional manner, even though standing alone they may not be per se unconstitutional (Cameron v. Johnson, 390 U.S. 611).

In Cameron, the Supreme Court aptly explained:

> "We have not hesitated on direct review to strike down applications of constitutional

> statutes which we have found to be unconstitutionally applied to suppress protected freedoms. See Cox v. Louisiana, (379 U.S. 559, 85 S. Ct. 476, 13 L. Ed.2d 487 [1965]); Wright v. Georgia, 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed.2d 349; Edwards v. South Carolina, (372 U.S. 229, 83 S. Ct. 680, 9 L. Ed.2d 697 [1963])." Cameron v. Johnson, supra, 390 U.S. at 620, 88 S. Ct. at 1340.

We submit therefore, that the conviction was unconstitutional because it was based upon these clandestine and unpublished (in the Federal Register) "regulations." No taxpayer could be aware of them. Ignorance of the law may not be an excuse, but the nonexistence of a law or the utilization of an unavailable "regulation" would certainly be improper and unconstitutional.

> Graham v. Lawrimore, 185 F. Supp. 761 (E.D. S.C. 1960), aff'd 287 F.2d 207 (4 Cir. 1961).

Conclusion

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

s/ Irving Anolik
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Order Denying Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

71-1985

- -x

United States of America,

Plaintiff-Appellee,

v.

John A. Masiello, William Williams,

Defendants,

John A. Masiello,

Defendant-Appellant.

- -x

A petition for a rehearing together with a motion to recall the mandate; to stay its reissuance; and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States, having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Order Denying Rehearing

s/ Henry J. Friendly
HENRY J. FRIENDLY, Chief Judge

s/ Leonard P. Moore
LEONARD P. MOORE, U.S.C.J.

s/ James L. Oakes
JAMES L. OAKES, U.S.C.J.

January 26, 1972

Order of Affirmance

UNITED STATES COURT OF APPEALS

For the

SECOND CIRCUIT

71-1985

At the Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of January, One Thousand Nine Hundred and Seventy-two.

Present:

BEFORE:

HON. HENRY J. FRIENDLY,
Chief Judge

HON. LEONARD P. MOORE
HON. JAMES L. OAKES,
Circuit Judges.

Order of Affirmance

- -x

United States of America,

Plaintiff-Appellee,

v.

John A. Masiello, William Williams,

Defendants,

John A. Masiello,

Defendant-Appellant.

- -x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

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No. 71-1086

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN A. MASIELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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No. 71-1086

JOHN A. MASIELLO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinions were filed by the court of appeals or the district court.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1972 (Pet. App. 3a–4a) and rehearing was denied on January 26, 1972 (Pet. App. 1a–2a). The petition for certiorari was filed on February 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether the conviction was tainted by a seizure challenged as illegal.

2. Whether the conviction was improper because petitioner was entrapped.

3. Whether the duties which an agent was bribed to violate were properly established by official Regulations and Rules of Conduct promulgated by the Treasury Department and the Internal Revenue Service.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of bribing and of conspiring with William Williams to bribe a revenue agent of the Internal Revenue Service, in violation of 18 U.S.C. 201 and 18 U.S.C. 371. (R. 3a–8a).[1]

In November 1968, a revenue agent, Lawrence Ruggiero, reported to the Inspection Division of the Internal Revenue Service that a former Internal Revenue Service special agent, William Williams, had confided to Ruggiero that widespread corruption existed in the local Internal Revenue Service office. The Inspection Division thereupon asked Agent Ruggiero to "assume the role of a corrupt revenue agent," and, thereafter, Ruggiero met once or twice a week with Williams, who represented various taxpayers whom Agent Ruggiero was auditing (R. 22a–24a).

In April 1969, Special Agent Bruh was assigned by the Internal Revenue Service to a criminal tax inves-

[1] "R." refers to the record appendix filed in the court of appeals.

tigation of petitioner for the tax years 1965, 1966 and 1967, and he determined that petitioner had filed no tax returns for those years (R. 9a–12a).

When Agent Ruggiero's undercover assignment was initiated, it was not related to any investigation of petitioner (R. 66a–67a), but on September 18, 1969, Ruggiero was told by Williams that he had a later appointment with petitioner. Thereupon, Ruggiero stated he could possibly get petitioner's tax returns assigned to himself, and Williams urged him to do this, so that Ruggiero could furnish information to petitioner concerning Special Agent Bruh's fraud investigation (R. 26a–28a, 65a). Williams stated he would speak to petitioner about paying Ruggiero for this information and, on the following day, the agent was informed by Williams that petitioner said the arrangement was "fine" and he would pay $250 per month "just for information" about the investigation by Special Agent Bruh (R. 26a–30a). The agent was also told by Williams that separate payments would be made for such additional help as reducing petitioner's tax liability (R. 69a).

Official information was, with the approval of the revenue agent's superiors, disclosed by the agent to Williams concerning the decision of the Internal Revenue Service temporarily to suspend efforts to collect on a $50,000 assessment against A. & R. Corporation, for which petitioner might be personally liable. He also disclosed that Special Agent Bruh was investigating a $3,000,000 bank account in Florida which might possibly belong to petitioner (R. 33a–40a).

On December 6, 1969, Agent Ruggiero met with petitioner. At this meeting, Williams told petitioner that further meetings of petitioner with the agent were not necessary, that Williams would handle matters, and the agent was their only source of information. Williams suggested to petitioner that Agent Ruggiero be "put on the payroll for $250 a month." Petitioner said he had been using Williams for years, that the arrangement with Ruggiero was all right, and that he wished to find out what was on the mind of Special Agent Bruh. Information concerning the suspension of efforts to collect the $50,000 assessment and the Florida bank account was also discussed by Ruggiero with petitioner and Williams at the December 6, 1969, meeting (R. 46a–48a). On December 9, 1969, Agent Ruggiero was given $200 in cash by Williams, who kept $50 for himself (R. 50a).

Agent Ruggiero testified that he was not authorized to disclose any of this information in the absence of specific authorization from the Inspection Division of the Internal Revenue Service (R. 59a). For the purpose of establishing the duty of an agent not to disclose official information without specific authorization, the government introduced into evidence certain excerpts from publications of the Treasury Department [2] and of the Internal Revenue Service.[3]

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[2] Standards of Conduct for Employees of the Treasury Department. 31 C.F.R. 0.735.47. (Exhibit 10; R. 88a. 100a.)

[3] Rules of Conduct for Internal Revenue Service Employees. (Exhibit 11; R. 88a, 100a–101a.)

Petitioner introduced no evidence in his own defense. The district court denied petitioner's motion to set aside the verdict of guilty (R. 2a), and the conviction was affirmed by the court of appeals (Pet. App. 3a–4a).

ARGUMENT

1. Petitioner contends, for the first time in this Court, that the tax audit, investigation, criminal charge, prosecution and conviction were tainted by a prior, allegedly illegal, seizure of records of certain corporations in which petitioner was a shareholder (Pet. 6). However, the legality of that seizure, which was made incident to executing an arrest warrant issued on the basis of an indictment which included the corporations, was upheld in a prior criminal proceeding, in which petitioner was convicted of a different bribery charge. *United States* v. *Masiello,* 434 F. 2d 33 (C.A. 2) (remanding for further hearing); *United States* v. *Masiello,* 445 F. 2d 1324 (C.A. 2) (conviction affirmed), certiorari denied, January 24, 1972 (No. 71–656).

Even assuming the primary illegality asserted by petitioner, he nevertheless failed to establish that this tax case resulted through exploitation of the seized records. *Hoffa* v. *United States,* 385 U.S. 293, 309. By his failure to raise the issue below, petitioner foreclosed a determination on possible attenuation of the asserted illegality. See *Costello* v. *United States,* 365 U.S. 265, 278–280; *Lanza* v. *New York,* 370 U.S. 139, 145–146; *Wong Sun* v. *United States,* 371 U.S. 471,

491. Petitioner's failure to raise this issue by timely motion or objection should preclude further appellate considerations of his present contention. *Rugendorf* v. *United States*, 376 U.S. 528, 535; *Frazier* v. *United States*, 335 U.S. 497, 503.

Finally, the illegality of an investigation would be no defense to an act of bribery committed by the suspected person. See *Dennis* v. *United States*, 384 U.S. 855, 856; *United States* v. *Knox*, 396 U.S. 77.

2. Similarly, there is no merit in petitioner's contention (Pet. 7) that the defense of entrapment is so strongly indicated on the record as to make his conviction plainly erroneous, despite his conceded failure to raise the issue in the courts below. In fact, petitioner affirmatively disclaimed reliance on this defense (R. 73a). The facts show (Statement, *supra*) that petitioner had previously employed Williams to secure unauthorized disclosures of official information (R. 48a, 65a). As petitioner was merely offered an opportunity to commit bribery, there was no basis for an entrapment defense. *Sherman* v. *United States*, 356 U.S. 369, 372; *Sorrells* v. *United States*, 287 U.S. 435, 441; *United States* v. *Comi*, 336 F. 2d 856, 859–860 (C.A. 4).

3. Finally, petitioner contends (Pet. 8–9) that the administrative rules and regulations were an improper basis for establishing the official duties petitioner is charged with bribing the agent to violate. But it has long been settled that such regulations have the force

of law and that inducing an official to violate them constitutes a crime under Section 201(b)(3), which forbids inducing a public official from doing "any act in violation of his lawful duty." See *Haas* v. *Henkel*, 216 U.S. 462).

In *Haas*, the indictment charged a conspiracy to bribe a Department of Agriculture employee to give out advance information about monthly cotton reports in violation of the Department's written and published regulation that no crop information should be divulged without the written approval of a bureau chief. This Court flatly rejected defendant's contention that no offense could be made out because there was no formal statute prohibiting the giving out of such official secrets. As the court below had said:

> "The words 'lawful duty' are not to be considered as duty imposed by law or statute, but as duty lawfully imposed in any way * * *. The usage and the regulations in question were intended for the government of the department, [and] were entirely consistent with law * * *. They were therefore lawfully imposed on * * * [the Department employee] and it was his duty to obey them. Although his failure to do so may not be a crime, because no statute has made it so, still section 5451 [now section 201(b)] does make it a crime for any one, by the payment of money, etc., to induce him to violate this lawful duty." [*Haas* v. *Henkel*, 166 Fed. 621, 627 (S.D. N.Y.].

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 71-1092

In the Supreme Court of the United States

OCTOBER TERM, 1971

STAR OFFICE SUPPLY COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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General Counsel,
Federal Trade Commission,
Washington, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1092

STAR OFFICE SUPPLY COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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1. The Federal Trade Commission found that petitioners, Star Office Supply Company and its president, Henry Pinkwater, had engaged in unfair, false, misleading and deceptive practices in the sale of office supplies in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and entered a ten paragraph cease-and-desist order (Pet. App. A 2, A 110–A 112). The court of appeals affirmed from the bench without opinion (Pet. 5).

The evidence showed that petitioners solicited orders for office supplies by telephoning prospective purchasers and misrepresenting the nature of their busi-

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ness and their affiliations. Petitioners' jobber-salesmen would frequently claim that they had been recommended by another official of the prospect's firm; that they were attempting to liquidate a relative's stationery firm, and knew nothing of the business; and that they were affiliated with organizations such as Radio Free Europe. None of these assertions was true. See *e.g.*, Pet. App. A 45–A 46, A 58–A 59, A 60–A 61, A 66–A 67.

There was also considerable evidence that petitioners deliberately shipped more merchandise to purchasers than had been ordered (see, *e.g.*, Pet. App. A 50, A 51, A 53, A 56–A 57, A 66, A 70–A 71, A 75, A 88). Frequently, the price of goods would be billed at a higher amount than the purchaser had been led to expect (see *e.g.*, App. A 55–A 56, A 83). Merchandise sold this way was often returned, but frequently a portion of the order would be inadvertently used, or retained, and paid for by the customer (App. A 51, A 53, A 56, A 57, A 60, A 73).

The Commission's order (App. A 110–A 112) directed petitioners to cease and desist such misrepresentations; to furnish purchasers with pre-shipment written notification as to the type, quantity and price of the supplies to be shipped (para. 7); not to deviate from the pre-shipment written notification unless upon express authorization of the purchaser (para. 8); and not to thwart cancellation of any orders obtained in violation of the cease and desist order (para. 9).

2. Petitioners do not question the Commission's finding that their sales practices were unfair and de-

ceptive in violation of Section 5 of the Federal Trade Commission Act; they contend only that paragraph 7 of the order, requiring pre-shipment notification, was improper (Pet. 2). As this Court has repeatedly held, the Commission has broad authority to determine the type of order "necessary to cope with the unfair practices found." *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473. Unless the remedy selected "has no reasonable relation to the unlawful practices found to exist," the courts "will not interfere." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613.

The remedy chosen here is reasonably related to petitioners' practice of shipping larger quantities of merchandise than were ordered. As the Commission explained (Pet. App. A 8–A 9), pre-shipment notification will give customers the opportunity to inform petitioners of any variations between what was ordered and what petitioners intend to ship, and thus protect customers against excess shipment or increased prices. Indeed petitioners' continued argument in favor of "'[S]chlock' pressure methods of competitive selling" as "part of the *enterprise* energies in these fields of American business * * *" (Pet. 9, emphasis in original) demonstrates the Commission's wisdom in requiring a prophylactic remedy rather than a mere order to desist.

Contrary to petitioners' assertion (Pet. 6), the Commission's remedy here is not unique. The Commission has frequently required violators of Section 5

to take affirmative steps before making a sale to ensure that their customers are aware of the seller's obligations; such orders have uniformly been upheld by the courts. See, *e.g.*, *All-State Industries of North Carolina, Inc.* v. *Federal Trade Commission*, 423 F. 2d 423 (C.A. 4), certiorari denied, 400 U.S. 828; *Portwood* v. *Federal Trade Commission*, 418 F. 2d 419 (C.A. 10); *S & S Pharmaceutical Co.* v. *Federal Trade Commission*, 408 F. 2d 487 (C.A. 5).

3. Petitioners allege that paragraph 7 is a drastic remedy which will destroy their business "within a very short time" (Pet. 8). Even assuming that preshipment notification would be as onerous as petitioners claim,[1] Section 5 gives the Commission a mandate to stamp out unfair business practices, and, if need be, those businesses "which persist in practicing them." *Slough* v. *Federal Trade Commission*, 396 F. 2d 870, 872 (C.A. 5).

However, if the condition proves too onerous petitioner can apply to the Commission for relief. If that relief is denied, petitioner "must remember that those caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431.

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[1] Petitioners have previously used a quite similar procedure (Pet. A 93–A 94).

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RONALD M. DIETRICH,
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Federal Trade Commission.

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